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Evidence - Privilege - Statutory Privilege against Disclosure of Reporter's Sources Should Be Liberally Construed to Include Information in Documents

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This decision poses no threat to the high standards kept by most hospitals. It merely requires that hospitals now put their denials of admission to their staff upon a more rational basis then was evident here.[31]

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EVIDENCE—PRIVILEGE—STATUTORY PRIVILEGE AGAINST DISCLOSURE OF REPORTER'S SOURCES SHOULD BE LIBERALLY CONSTRUED TO INCLUDE INFORMATION IN DOCUMENTS.

In re Taylor (Pa. 1963)

Defendants, newspapermen, published certain secret reports of conversations between a former city official and the Philadelphia District Attorney. These talks involved alleged corruption in various branches of the city government. Defendants then indicated that they had additional information given them by the same informant, but refused to disclose it to a special grand jury in defiance of court order. They based their refusal upon a state statute[1] conveying secrecy of informational sources to newspapermen.

In a six to one decision, the Supreme Court of Pennsylvania *held* specifically that the documents in question were "sources of information" and protected, and generally that the public good required liberal construction of the statute. *In re Taylor,* 412 Pa. 32, 193 A.2d 181 (1963).

The duty of every individual to disclose, to the fullest extent of his knowledge, information relevant to issues in a court of justice, is deeply rooted in our common law tradition. However, from the same tradition has grown the concept of privilege, that is, excuse from testifying due to prior extenuating duty. Despite an initial flirtation with a wide "point of honor theory,"[2] the common law soon restricted its dispensation of such

31. In Shulman v. Washington Hosp. Center, 32 U.S.L. WEEK 2182 (D.D.C. Oct. 9, 1963), the court, in deciding whether the failure of a private hospital to renew the membership of a physician was subject to judicial review, quoted the general rule referred to in Levin v. Sinai Hosp., 186 Md. 174, 179-80, 46 A.2d 298, 301 (Ct. App. 1946), and refused to interfere on the grounds that courts are "not equipped to review the action of hospital authorities. . . ." The court cited *Greisman* saying it "seems to stand alone in apparently adopting a different rule." It seems that the court cites *Greisman* for too broad a holding and did not recognize certain factual distinctions. Referring to the hospital involved, the court points out there are a "number of similar institutions located in the city." This factor alone would eliminate the monopolistic situation present in *Greisman* and might indicate that plaintiff was not denied an "opportunity of earning a livelihood and serving society in his chosen trade or profession. . . ." Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 596, 170 A.2d 791, 799 (1961).

1. PA. STAT. ANN. tit. 28, § 330 (Supp. 1962).
2. See, *e.g.,* Bulstrod v. Letchmere, 2 Freem. 5, 22 Eng. Rep. 1019 (Ch. 1676).

benefits.[3] The attorney-client privilege, secured by a two-fold rationale,[4] has long been considered[5] essential for the protection of the individual faced with the necessity of consulting a lawyer.[6] Likewise communications between husband and wife[7] were privileged in the interests of conjugal happiness.[8] In each of these cases, society in general suffered for the benefit of the individual; it sacrificed its interest in truth to prevent the immediate detrimental effect which withholding of the privilege would have upon the individual.

These were the only privileged relationships to emerge intact from the common law after the demise of the "point of honor" theory. The physician-patient privilege, unlike its legal brother, had fallen in the *Duchess of Kingston*[9] case. Though it sprang up again in the United States as a result of legislative action,[10] it has always been considered alien to the common law.

In more recent times, there have been various attempts by certain professional groups to establish themselves as similarly privileged in their professional capacities. While accountants[11] and stenographers[12] have had some success in this endeavor, the greatest advances have been made, as this case indicates, with regard to the reporter-informant relationship.

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3. 20 How. St. Tr. 586 (1776). In a trial for bigamy, a friend of the accused refused to answer a question asked him by the court (House of Lords) justifying his refusal to answer upon a supposed "point of honor." He was then told that he was bound by law to answer all such questions.

4. 8 WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961). Summarized, these may be expressed as follows:

a. the concern of the judiciary for the attorney's honor—a facet of the "point of honor" concept, and

b. the concern of the judiciary for the removal of the client's apprehension in consulting his lawyer so as to promote full disclosure.

5. Berd v. Lovelace, Cary 88, 21 Eng. Rep. 33 (Ch. 1577); Austen v. Vesey, Cary 63, 21 Eng. Rep. 34 (Ch. 1577).

6. MODEL CODE OF EVIDENCE rule 210, comment *a* (1942), after citing the complexity of today's laws and the consequent need of the layman for expert legal advice, states that "the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity."

7. Though often confused with the marital prohibition against giving adverse testimony, this instance of the conjugal right to privacy is separate and self-sustaining. It is both narrower than the adverse testimony prohibition in that it includes only personal contacts, and also wider insofar as the information involved does not have to be adverse to one of the couple in order to be privileged.

8. COMMON LAW COMMISSION, SECOND REPORT 13 (1853), reprinted in 8 WIGMORE, EVIDENCE § 2332 (McNaughton rev. 1961), reads:

> So much of the happiness of human life may fairly be said to depend upon the inviolability of domestic confidence that the alarm and unhappiness occasioned to society by invading its sanctity and compelling the public disclosures of confidential communications between husband and wife would be a far greater evil than the disadvantage which may occasionally arise from the loss of light which such revelations might throw on questions in dispute.

For case law comment on the subject see Mercer v. State, 40 Fla. 216, 24 So. 154 (1898); McCormick v. State, 135 Tenn. 218, 186 S.W. 95 (1916).

9. 20 How. St. Tr. 586 (1776).

10. 8 WIGMORE, EVIDENCE § 2380 (McNaughton rev. 1961).

11. ARIZ. REV. STAT. ANN. § 32-743 (1956); FLA. STAT. ANN. § 473.15 (1952).

12. IOWA CODE ANN. § 622.10 (1946). However, this applies only to stenographers and clerks of professionals who enjoy the privilege in their own right, for example, attorneys and doctors.

The rationale advanced by the journalists has two distinct facets. One is that the reporter's conscience will be compromised by enforced source revelation; the other is that the public good will be advanced by allowing secrecy. The first is illogical since it is based upon a position into which the reporter has placed himself (and it was this argument which was repudiated in the *Duchess of Kingston*[13] case); the second, while logical,[14] was never accepted by the courts as a factual reality.

Wigmore faults the concept as not fulfilling his four-fold test of essentiality[15] and the American Bar Association[16] has rejected it completely. Almost without exception,[17] both state and federal courts[18] have consistently held that newspapermen possess no common law right to an evidentiary privilege.

In the well-known case of *Plunkett v. Hamilton,*[19] the Georgia court held that a possible personal loss to the reporter was no basis for his refusal to answer questions properly put to him. Likewise, in the case of *In re Grunow,*[20] the New Jersey Supreme Court stated that "such an immunity (newspaperman's privilege) would be detrimental to the due administration of law." The demands of the press were not to be so easily stilled however.

Perhaps finding new direction in the remarks of a New York judge[21] as he handed down another anti-press decision, journalism turned its lobbies towards state legislatures. Though Maryland had been the only state to legislatively recognize such a privilege up until 1933, in the sixteen

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13. 20 How. St. Tr. 586 (1776).

14. Actually, this is the same argument used in defending the attorney-client and the husband-wife privileges.

15. 8 WIGMORE, EVIDENCE § 2286 (McNaughton rev. 1961). The test is as follows:
a. The communications must originate in a *confidence* that they will not be *disclosed.*
b. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
c. The relation must be one which in the opinion of the community ought to be sedulously *fostered.*
d. The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation. (Emphasis added.)

16. ABA SECTION ON JUDICIAL ADMINISTRATION, REPORT OF THE COMMITTEE ON IMPROVEMENTS IN THE LAW OF EVIDENCE 87 (1938).

17. The one possible exception is the case of Burdick v. United States, 236 U.S. 79, 35 S.Ct. 267 (1914), *reversing* 211 Fed. 492 (S.D.N.Y. 1914), wherein the Supreme Court ruled that a newspaper editor did not have to reveal certain information given him by a confidant, basing their decision on the ground that such revelation might tend to incriminate Burdick.

18. Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), *cert. denied,* 358 U.S. 910, 79 S.Ct. 237 (1958); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957); Rosenberg v. Carrol, 99 F. Supp. 629 (S.D.N.Y. 1951); *Ex parte* Lawrence & Levings, 116 Cal. 299, 48 Pac. 124 (1897); Joslyn v. People, 67 Colo. 297, 185 Pac. 375 (1919); Pledger v. State, 77 Ga. 242, 3 S.E. 320 (1886); Clinton v. Commercial Tribune Co., 11 Ohio Dec. 603 (1901).

19. 136 Ga. 72, 70 S.E. 781 (1911).

20. 84 N.J.L. 235, 85 Atl. 1011 (1913).

21. People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 295, 199 N.E. 415, 416 (1936). "This court should not depart from the general rule . . . and create a privilege in favor of an additional class. If this is to be done, it should be done by the Legislature."

years following, eleven states passed such legislation.[22] The newspapers' arguments remained the same, but with the aid of press induced public pressure they enjoyed signal success. The general pattern behind each of these legislative acts was for a newspaperman to publish an exposé, refuse to disclose his source to an investigating court, be cited for contempt, and thus cause an avalanche of public sympathy ending in protective legislation.[23] Typical of these statutes was Pennsylvania's:

> No person, engaged on, connected with, or employed by any newspaper of general circulation as defined by the laws of this Commonwealth, or any press association or any radio or television station, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial, or investigation before any court, grand jury, traverse or petit jury, or any officer thereof, before the General Assembly or any committee thereof, before any commission, department, or bureau of this Commonwealth, or before any county or municipal body, officer, or committee thereof. . . .[24]

Of the twelve, all but Arkansas were unqualified in their coverage.[25] There is some variation in the statutes insofar as certain ones include radio and, or television;[26] but in the press' particular area, the only distinction of note is that four states[27] give the privilege to press associations as well as newspaper personnel.

While in some ways it relates to its common law antecedents, the statutory concept of a reporter's privilege is quite unique in one major respect: it is distinctly a privilege rather than a prohibition, that is, the revelation of material is entirely discretionary in the hands of the reporter. Unlike an attorney, a husband, or a wife, the reporter needs no permission from the confiding party in order to speak.[28]

The initial reaction of the courts to this action by the legislatures was far from enthusiastic. Statutes with regard to both the physician-patient[29]

22. CODE OF ALA. tit. 7, § 370 (1958); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1962); ARK. STAT. ANN. tit. 43, § 917 (Supp. 1962); CAL. CODE CIV. PROC. § 1881-6 (Supp. 1962); IND. ANN. STAT. § 2-1733 (Burns Supp. 1963); KY. REV. STAT. § 421.100 (1962); MD. CODE ANN. art. 35, § 2 (1957); MICH. STAT. ANN. § 28.945(1) (1954); MONT. REV. CODES ANN. § 93-601-2 (Supp. 1961); N.J. STAT. ANN. § 2A-84A-21 (Supp. 1962); OHIO REV. CODE ANN. § 2739.12 (Baldwin 1962); PA. STAT. ANN. tit. 28, § 330 (Supp. 1962).

23. For the case which precipitated Maryland's law, see John T. Morris (unreported), *Editor & Publisher*, Sept. 1, 1934, p. 9.

24. PA. STAT. ANN. tit. 28, § 330 (Supp. 1962).

25. Arkansas requires an absence of malice, that is, good faith, to effect the privilege. ARK. STAT. ANN. tit. 43, § 917 (Supp. 1962).

26. Alabama, Arkansas, California, Indiana, Kentucky, Maryland, Montana, Ohio, Pennsylvania.

27. Indiana, Montana, Ohio, Pennsylvania.

28. Brogan v. Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1956). "The Statute is permissive and not mandatory and leaves a newspaper editor free to tell the source of his information. One thing is clear: the statute confers a privilege upon the newspaper editor, and not upon the source, to protect his source of information if he chooses to do so. The statute says only that he may not be compelled to reveal the source, but obviously he can voluntarily make a disclosure." *Id.* at 151-52, 123 A.2d at 480.

29. General Acc. Fire & Life Ins. Co. v. Tibbs, 102 Ind. App. 262, 2 N.E.2d 229 (1936).

and the public official-duty[30] situations were narrowly interpreted; following this principle, the Supreme Court of New Jersey likewise limited its legislatively authorized newspaperman's privilege in its first appearance before the bench. In *State v. Donovan*,[31] a newspaperman refused to name the means by which he had obtained information from a known source. The court ruled that New Jersey's press protection statute,[32] since it was "in derogation of common law rights," should be strictly construed and that the courts were "not to infer that the legislature intended to alter the common law principles further than is clearly expressed or the case absolutely requires."[33] The "means" of obtaining information were therefore not included in the definition of "source" of information, hence were not protected. This principle of strict construction was recently reaffirmed in *Brogan v. Passaic Daily News*.[34]

The entire history of the "newspaperman's privilege" in the courts had been one of frustration. With or without statutes they were unable to secure a substantial judicial welcome.

The instant case, however, branches off from this stream of intolerance. The Pennsylvania statute[35] was no different in its conception than New Jersey's, yet the courts of each state assumed contrary positions with regard to general interpretation. Although the Pennsylvania Supreme Court tried to justify its decision initially on a broad definition of "source," the length of its comment on the "interpretation" question serves to indicate its own doubts as to the correctness of its position.

"Source," as the court defined it, "means not only *identity* of persons, but likewise includes documents [and] inanimate objects. . . ."[36] The logical fallacy here is the failure to make the distinction between "source" and "information." The court assumes that because the *identities* of persons or documents are protected, the information which they contain is similarly protected. The dictionary defines a source as "a place where something is found or whence it is taken or derived."[37] Thus while either a particular person or a particular document can be a *source,* the material which it contains is *information.* As the statute is worded, it protects the "source of any information." The statute itself makes the distinction which the

30. Samish v. Superior Court, 28 Cal. App. 2d 685, 83 P.2d 305 (1938).

31. 129 N.J.L. 478, 30 A.2d 421 (1943).

32. Laws of N.J., ch. 167, § 2 (1933). The exact language is as follows:

No person engaged in, connected with or employed on any newspaper shall be compelled to disclose, in any legal proceeding or trial, before any court or before a grand jury of any county or a petit jury of any court or before the presiding officer of any tribunal or his agent or agents, or before any committee of the Legislature, or elsewhere, the source of any information procured or obtained by him and published in the newspaper on which he is engaged, connected with or employed.

33. State v. Donovan, 129 N.J.L. 478, 486, 30 A.2d 421, 426 (1943).

34. 22 N.J. 139, 123 A.2d 476 (1956).

35. PA. STAT. ANN. tit. 28, § 330 (Supp. 1962).

36. *In re* Taylor, 412 Pa. 32, 40, 193 A.2d 181, 185 (1963).

37. BLACK, LAW DICTIONARY (4th ed. 1951).

court has failed to do. If it had said "source *or* any information" there would have been semantic justification for this holding. Since the statute is not worded in the latter form, the logical conclusion would have seemed to be that once the source is identified, the protection is extinguished and the information the source contains must be divulged.

Since both the name of the informer, as well as the existence of the documents (the sources) were known, the court was forced to travel far beyond the plain meaning of the word "source" in order to find that the information the documents contained was protected.

In *State v. Donovan*[38] the New Jersey court steadfastly refused to depart from the strict letter of the statute. However, the Pennsylvania court states that "the statute must be liberally construed in favor of the newspapers and news media." Why did the court refuse to adhere to the generally accepted principle of strict construction? A partial answer may well lie in another Pennsylvania statute[39] which abolished the absolute rule that statutes in derogation of the common law must be strictly construed. While this permissive statute certainly cannot be cited as the sole deciding factor in the court's choice,[40] it did succeed in establishing a more conducive atmosphere for such a change.

The argument of the majority offers nothing new. It is noteworthy analytically only insofar as it omits entirely the reporter conflict of conscience thesis and fastens its decision completely on the "public good" theory.

The majority cites no legal precedent whatsoever for their position of liberal interpretation; their decision is based solely on a factual determination of social needs. They have been convinced, as no other court before them has, that the advantages to be gained by granting the reporter privilege, in a situation where its refusal would have been as easily justified, far outweigh the disadvantages of the inaccessibility of the information.

In many ways the court's decision is comparable to that of the English courts two hundred years ago which determined that a "point of honor" privilege had no place in their society. Time has proven the English correct in that election; the same may not hold true here.

As pointed out earlier, the newspapers' argument has always been logical,[41] the difficulty has been finding facts to support it. No such facts, however, are presented by the majority. There is merely the statement that "[w]e are convinced that the public welfare will be benefited more extensively and to a far greater degree by the protection of all sources of disclosure of crime, conspiracy and corruption than it would be by the occasional disclosure of the sources of newspaper information concerning a crime."[42]

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38. 129 N.J.L. 478, 30 A.2d 421 (1943).
39. PA. STAT. ANN. tit. 46, § 557 (1952).
40. The court did not even mention it in its opinion.
41. This, of course, assumes the dismissal of the conflict of conscience thesis.
42. *In re* Taylor, 412 Pa. 32, 41, 193 A.2d 181, 185 (1963). In the recent English cases of Attorney-General v. Mulholland and Attorney-General v. Foster,

While it cannot be doubted that newspapers—especially when aided by informants—have often led the fight against crime, their claim to privilege must be considered in the light of its effect upon the right of the people to have all information made available to its courts. A privilege is not granted unless a need more specific than the general welfare is involved. It is difficult to put the potential disadvantages of a newspaper or its reporters, if the privilege is not given, on the same plane as the disadvantages suffered by a client or spouse if the privileges there applicable are denied. The newspaper loses nothing as essential as its right to counsel, nor will its internal tranquility be disturbed. The most that can be said is that without the privilege, the newspaper is less effective in its reporting of crime and corruption; but even this effect would seem to be minimal and far from sufficient to override the courts' need for truth as the principal ingredient in adjusting the rights of litigants.

The results of a decision such as this could be quite far reaching in that it greatly increases the powers of professional journalists and has a decided tendency to make them less responsible to law. Since it is obvious that at least comparable standards of journalism are being maintained in jurisdictions where no protective privileges are granted, it is submitted that the holding in the instant case is an unwarranted extension of an already needlessly granted statutory privilege.

The instant case, the first to test the scope of the 1937 statute, arose in the context of a special grand jury investigation, not a trial. Though the language of the court does not seem to indicate that a different result would have been reached had there been a trial, consideration of the privilege in its courtroom context could raise serious problems. Would the court, for example, have reached the same decision if the newspaper had claimed privilege with regard to information necessary to the defense in a capital case? Consistency would compel this result. Yet it is doubtful that the court would, or could, say that the social good to be derived from granting the privilege would outweigh the manifest injustice of an erroneous conviction. Nevertheless, the instant case looms as precedent for such a decision.

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[1963] 2 Weekly L.R. 658 (C.A.), the Court of Appeals concluded that there was no common law newspaperman's privilege. While this is in line with the non-statutory American cases previously cited, the rationale of the court is extremely interesting. It holds that there is no privilege for precisely the same reason the Pennsylvania Supreme Court held that the statute should be liberally construed—public policy. Said the court:

> . . . [I]t is in the public interest for the tribunal to inquire as to the sources of information. How is anyone not to know that the story was not pure invention, if the journal will not tell the tribunal its source? Even if it was not invention, how is anyone to know it was not the gossip of some idler seeking to impress? It may be mere rumor unless the journalist shows he got it from a trustworthy source. *Id.* at 667.

While the court grants that sources should not be indiscriminately revealed, it maintains steadfastly that once the relevance of the source to the case has been determined, public order demands its revelation.